(4)

Supreme Court, U.S.
FILED
OCT 22 2002
OFFICE OF THE CLERK

NO. 02-392

IN THE

Supreme Court of the United States

EMIL NOTTI, ET AL.,

Petitioners,

v.

COOK INLET REGION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

FRED W. TRIEM
Counsel of Record
Box 129
Petersburg, Alaska
99833-0129
(907) 772-3911
triemlaw@alaska.net

14 pp

QUESTIONS PRESENTED

Should this Court resolve the issues it left open in *Merrell Dow:*

1. Can the adoption of federal law by a state statute give rise to § 1331 federal question jurisdiction when the federal law does not occupy the field, does not entirely displace state law, does not create a federal cause of action, and does not contain a federal remedy?

2. Should this Court adopt a bright line rule requiring the existence of a private cause of action and remedy under federal law before it will allow § 1331 jurisdiction?

3. Should this Court adopt a bright line rule that a federal law that provides no private remedy cannot supply a "jurisdiction-triggering federal question"† and thus cannot give rise to § 1331 jurisdiction?

---

† *Merrell Dow Pharmaceuticals v. Thompson,* 478 U.S. 804, 817 & n.15 (1986).

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REASONS FOR SUPPLEMENTAL BRIEF 1

SUPPLEMENTAL BRIEF 2

I. Recent decisions illustrate the conflict among the cirucits 2

II. Recent decisions show the disparate application of the rule prohibiting use of a preemption defense to supply removal jurisdiction 5

III. These recent cases illustrate the "welter of issues" surrounding federal question jurisdiction over state law claims 7

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Abada v. Charles Schwab & Co., Inc., 300 F.3d 1112 (9th Cir. 2002) 6

Anderson v. H &R. Block, Inc., 287 F.3d 1038 (11th Cir. 2002) 6

Arana v. Ochsner Health Plan, Inc., 302 F.3d 462 (5th Cir. 2002) 6

Breuer v. Jim's Concrete of Brevard, Inc., 292 F.3d 1308 (11th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3169 (U.S. 3 September 2002) (No. 02-337) 3

Caterpillar Tractor v. Williamson, 482 U.S. 386 (1987). 5, 6

Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1 (1983) 5, 7

Howery v. Allstate Ins. Co., 243 F.3d 912 (5th Cir. 2001) 7

Merrell Dow Pharmaceuticals v. Thompson, 478 U.S. 804 (1986) ..... i, 3, 4

MSOF Corporation v. Exxon Corporation, 295 F.3d 485 (5th Cir. 2002), *petition for cert. filed sub nom. NPC Services Inc. v. MSOF Corp.*, 71 U.S.L.W. 3247 (U.S. 18 September 2002) (No. 02-478) 2, 3

Mulcahey v. Columbia Organic Chemicals Co. Inc., 29 F.3d 148 (4th Cir. 1994) 7

Syngenta Crop Protection, Inc. v. Henson,
This Court, Case No. 01-757
(argued on 15 October 2002) 9

TCG New York, Inc. v. City of White Plains,
___ F.3d ___, 2002 WL 31045144
(2nd Cir., 12 September 2002) 4

Wander v. Kaus, ___ F.3d ___, 2002 WL 31096289
(9th Cir., 20 September 2002) 4

XL Sports, Ltd. v. Lawler, 2002 WL 31260355
(6th Cir., 8 October 2002) 6

STATUTES

28 U.S.C. § 2106 ..... 8, 9

RULES

Supreme Court Rule 10 ..... 6, 8

Supreme Court Rule 15.8 1

Supreme Court Rule 16.1 9

IN THE

Supreme Court of the United States

EMIL NOTTI, ET AL.,

Petitioners,

v.

COOK INLET REGION, INC.,

Respondent,

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

Recent decisions in the courts of appeals demonstrate the confusion in the law of removal jurisdiction and illustrate the conflicts among the circuits.

Pursuant to Supreme Court Rule 15.8, the petitioning shareholders submit this supplemental brief to show how very recent case law — and recently filed petitions for certiorari in other cases — establish the need for review to clarify the law and to promulgate a uniform rule of federal question jurisdiction.

I. RECENT DECISIONS ILLUSTRATE THE CONFLICT AMONG THE CIRCUITS

A recent decision of the Fifth Circuit shows the disparate treatment given to a similar removal issue.

Conflicting Treatment of Removal Issue by 5th & 9th Cirs.

MSOF v. Exxon 295 F.3d 485 (5th Cir. 2002)	***Notti v. CIRI*** 31 Fed.Appx. 586 (9th Cir.'02)
Rejected federal statute as basis for removal jurisdiction	Allowed federal statute as basis for removal jurisdiction
"The vindication of these plaintiffs' rights does not turn on resolution of a federal question." *Id.* at 491	"The district court had subject matter jurisdiction because the complaint raises a substantial federal question"
Recognizes state law cause of action as basis for	State law cause of action trumped by federal statute
Jurisdiction grounded on state law basis by 5th Cir.	Jurisdiction grounded on federal law basis by 9th Cir
"A defense that raises a federal issue is insufficient" *Id.* at 490	Federal issue comes in via CIRI's preemption defense, not via plaintiffs' claims
"There is no federal question jurisdiction arising from preemption." *Id.* at 491	"ANCSA expressly preempts Alaska law" & provides jurisdiction *Id.* at 587
Remand denied by dist. ct.	Remand denied by dist. ct.
Reversed by ct. of appeals	Affirmed by ct. of appeals
Cert petition — No. 02-478	Cert petition — No. 02-392

MSOF Corporation v. Exxon Corporation, 295 F.3d 485 (5th Cir. 2002), *petition for cert. filed sub nom. NPC Services Inc. v. MSOF Corp.*, 71 U.S.L.W. 3247 (U.S. 18 September 2002) (No. 02-478) *Id.*, 295 F.3d at 490 ("A defense that raises a federal question is insufficient").

The *MSOF* case — recently filed on the certiorari docket — is an example of the conflict among the circuits. Review should be granted in both cases to resolve the ambiguity in the law of removal jurisdiction.

Another recent case presenting a conflict among the circuits on removal jurisdiction, and now before this court on its certiorari docket, is *Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d 1308 (11th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3169 (U.S. 3 September 2002) (No. 02-337):

> Because of the long-standing difference among the district courts and the apparent conflict between the Eighth Circuit in *Johnson v. Butler Bros.* and the First Circuit in *Cosme Nieves*, and now with this Circuit, it would appear to be important for either Congress or the United States Supreme Court to resolve this issue and bring uniformity to the federal courts in this regard. Litigants should not be treated with such disparity in our federal system.

Id., 292 F.3d at 1310 & n.3 (underlining added) (citing conflicts among the lower courts and collecting cases).

Just a few weeks ago, the Second Circuit expressed its disagreement with the Sixth Circuit in a case that continues the debate about the meaning of *Merrell Dow's* holding:

> The first matter that needs to be considered is whether this court has jurisdiction to resolve TCG's claims. One circuit court has held, in the context of TCA litigation, that if no private cause of action is created by a statute, the federal courts lack subject matter jurisdiction. *See TCG Detroit v. City of Dearborn,* 206 F.3d 618, 622-24 (6th Cir. 2000) (holding that, because the existence of a cause of action goes to subject matter jurisdiction, courts must determine whether an implied cause of action is created sua sponte, and then concluding that § 253 does imply a private cause of action). White Plains does not argue that there is no private cause of action, but if the issue were jurisdictional, we would have to determine it nonetheless. The Sixth Circuit's reliance on *Merrell Dow Pharm. Inc. v. Thompson,* 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986), is misguided.

TCG New York, Inc. v. City of White Plains, ___ F.3d ___, 2002 WL 31045144, *4 (2nd Cir., 12 September 2002) (underlining added).

Only a few days later, on 20 September 2002, the Ninth Circuit again demonstrated the ambiguity within the *Merrell Dow* holding when it focused — as it apparently did in *Notti v. CIRI* — on "the nature of the federal interest at stake" instead of upon the presence of a federal cause of action. *Wander v. Kaus*, ___ F.3d ___, 2002 WL 31096289 (9th Cir., 20 September 2002) (but concluding that disability claim did not arise under federal law and affirming dismissal for lack of subject matter jurisdiction).

II. RECENT DECISIONS SHOW THE DISPARATE APPLICATION OF THE RULE PROHIBITING USE OF A PREEMPTION DEFENSE TO SUPPLY REMOVAL JURISDICTION

The rule that prohibits a defendant from removing a state law case to federal court on the basis of a preemption defense — a rule that was *not* applied, but should have been, in *Notti v. CIRI.* The rule was stated long ago in the *Mottley* and *Gully* cases, and renewed in more detail in the 1980's:

> [A] case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.

Caterpillar, Inc. v. Williams, 482 U.S. 386, 392-93, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987) (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust,* 463 U.S. 1, 12, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983)).

Notti v. CIRI is a state law case about a breach of the corporate contract that was removed to federal court. Removed not because the plaintiffs asserted any claim under federal law, but instead because *defendant* inserted the federal issue by way of its defense — the defense of preemption: CIRI argued that state corporate law is preempted by federal law, by ANCSA § 7(r). However, the federal issue cannot come in by way of preemption.

Recent cases have applied correctly the rule that was not obeyed by the Ninth Circuit here in *Notti*: a defense of preemption does not create removal jurisdiction. *Defendant cannot remove from state court by asserting a defense of preemption.*

Recent examples of the correct application of this rule include:

- *Anderson v. H &R. Block, Inc.*, 287 F.3d 1038, 1042 (11th Cir. 2002) ("'Congress has long since decided that federal defenses do not provide a basis for removal.'" citing *Caterpillar Inc. v. Williams*).

- *Abada v. Charles Schwab & Co., Inc.*, 300 F.3d 1112, 1118 (9th Cir. 2002) (appeal dismissed).

- *Arana v. Ochsner Health Plan, Inc.*, 302 F.3d 462, 467(5th Cir. 2002) (ERISA case; remanded).

- *XL Sports, Ltd. v. Lawler*, 2002 WL 31260355 (6th Cir., 8 October 2002) (removal held improper).

The Ninth Circuit's failure to apply the anti-removal rule here in *Notti* conflicts with other decisions, is contrary to Supreme Court precedent, and therefore is a basis for review under Supreme Court Rule 10(c) ("court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court").

III. THESE RECENT CASES ILLUSTRATE THE "WELTER OF ISSUES" SURROUNDING FEDERAL QUESTION JURISDICTION OVER STATE LAW CLAIMS

This Court has described it as a *welter*[1]:

> Especially when considered in light of § 1441's removal jurisdiction, the phrase "arising under" masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system.

Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 8, 77 L.Ed.2d 420, 430, 103 S.Ct. 2841, (1983).

The allocation and sharing of judicial power between state and federal courts is the soul of our federal system. *Mulcahey v. Columbia Organic Chemicals Co. Inc.,* 29 F.3d 148, 151 (4th Cir. 1994) ("Because removal jurisdiction raises significant federalism concerns, we must strictly construe removal jurisdiction."); *Howery v. Allstate Ins. Co.,* 243 F.3d 912, 918-19 (5th Cir. 2001) ("An expansive interpretation of the federal question statute to allow federal courts to assert jurisdiction over cases with tangential and inessential federal components

---

[1] *welter*: A confused mass; a jumble. Confusion; turmoil. AMERICAN HERITAGE DICTIONARY (3rd ed. 1992). A state of wild disorder; a chaotic mass. MERRIAM-WEBSTER'S DICTIONARY (10th ed. 1996).

would step upon the authority of state courts to decide state law and ignore the capacity of state courts to decide questions of federal law. It would allow a federal tail to wag the state dog.") (underlining added).

The decisions of the courts of appeals come down on both sides of the removal issue, presenting a conflict among the circuits, and showing the need for a clear rule that is sharp and unambiguous.

An issue of federal law that is a "welter" surely meets the admission tests of Supreme Court Rule 10 and 28 U.S.C. § 2106.

CONCLUSION

This Court should lift the velvet rope and admit these petitioning shareholders so they can file a brief on the merits and explain *why* the allocation of judicial power between the state courts and the federal courts *is the most important issue now before the Court.*

The Petition for Certiorari should be granted *or* the Ninth Circuit's decision should be vacated with instructions to remand to State court.

In the alternative, this Court should summarily reverse the decision of the Court of Appeals. Supreme Court Rule 16.1 and 28 U.S.C. § 2106 ("The Supreme Court . . . may [enter orders] . . . as may be just under the circumstances.").

In the second alternative, this petition should be held over to await the decision of this Court in other pending cases that present similar issues about the jurisdiction of the federal courts in removal cases.[2]

Respectfully submitted this 22nd day of October in 2002 at Petersburg, Alaska.

FRED W. TRIEM
Triem Law Office
Box 129
Petersburg, Alaska
99833-0129
triemlaw@alaska.net
(907) 772-3917
Attorney for Petitioners

---

[2] E.g., *Syngenta Crop Protection, Inc. v. Henson*, No. 01-757.